Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors

HIGH COURT (KUALA LUMPUR) — GUAMAN SIVIL NO S5-23-23-94
MOKHTAR SIDIN J
5 DECEMBER 1994

Civil Procedure *— Pleadings — Defence — Failure to file defence — Whether defendant deemed to admit averments pleaded in statement of claim — Whether defendant could give evidence in court as to defence — Effect of evidence*

Civil Procedure *— Pleadings — Defence — Failure to adduce evidence of pleaded defence — Whether defence deemed to be abandoned*

Tort *— Defamation — Libel — Whether natural and ordinary meaning of words or innuendo used in articles were defamatory — Whether intention of defamer relevant*

Tort *— Defamation — Libel — Defences — Words published not what was written — Whether writer should ensure what is published is what was written — Steps to take*

Tort *— Defamation — Libel — Apology — Effect — Whether apology a full and frank withdrawal — Whether unqualified — Whether mitigating factor in assessing damages*

Tort *— Defamation — Libel — Defences — Justification — Fair comment — Burden of proof — Whether basic facts upon which article was based were true*

Tort *— Defamation — Libel — Defences — Innocent publication — Whether printer of magazine could be said to have innocently published defamatory articles as articles plainly referred to plaintiff — Whether magazine had made offer of amends to plaintiff — Defamation Act 1957 s 7*

Tort *— Conspiracy to defame — Whether there was concerted agreement among writers, editor, publisher and printer of articles together with proprietor of magazine — Whether torts of conspiracy and defamation merged*

Tort *— Damages — Defamation — Quantum — Whether damages for defamation merged with damages for conspiracy — Whether award should act as full vindication of plaintiff's reputation*

Tort *— Damages — Defamation — Aggravated damages — Failure to prove justification or fair comment — Libel repeated when giving evidence in court*

The plaintiff was, inter alia, the group chief executive officer of Berjaya Group Bhd, a public-listed company. The plaintiff claimed damages for the torts of libel and conspiracy against seven defendants in respect of four articles ('the articles') published in three issues of the *Malaysian Industry* ('the magazine'). The first defendant was the editor-in-chief of the magazine and the second to fifth defendants wrote the articles. The sixth defendant was the publisher and proprietor of the magazine while the seventh defendant was the printer of three of the articles. The plaintiff alleged that the articles were defamatory of him and that each of the defendants had either

between themselves and/or in combination with others conspired by way of a systematic publication of defamatory articles to destroy his reputation and business career. The plaintiff also sought an injunction to restrain the defendants from further publication of the alleged libel.

The first to sixth defendants did not file their defences and, furthermore, the fourth defendant did not appear in court. The second and fifth defendants testified that what was printed was not what they had written. The fifth defendant informed the court that he had asked the first defendant to offer an unqualified apology to the plaintiff, which was published in the magazine. The fifth defendant also apologized to the plaintiff in open court. The third defendant alleged that what he had written was true and also relied on the defence of fair comment. He, however, refused to prove the allegations in his article. The first defendant testified on behalf of himself and the sixth defendant and admitted that the articles were libellous of the plaintiff but stated that he had left the responsibility of editing the articles to the editor of the magazine. The first defendant claimed that on discovering the articles were libellous, he had apologized to the plaintiff in the magazine. The seventh defendant's statement of defence pleaded innocent publication, justification, fair comment and privileged publication. However, the seventh defendant's managing director testified only on innocent publication.

Held, awarding the plaintiff a total of RM10m in damages against the defendants:

(1) Since no defence had been filed by the first to sixth defendants, they were deemed to admit the averments pleaded by the plaintiff. The first, second, third, fifth and sixth defendants were allowed to give evidence in court only for the purpose of mitigating the damages against them and not as evidence as to their defences. Accordingly, the third defendant's evidence on his defence of justification and fair comment, came to nought.

(2) It was a question of law for the court to decide whether the natural and ordinary meaning of the words used in the articles were capable of conveying a defamatory meaning of and concerning the plaintiff. Libel does not depend on the intention of the defamer but on the fact of defamation and it was irrelevant to consider the meaning the writer and publisher intended to convey. The question was to be determined by an objective test.

(3) The articles in their natural and ordinary meaning and/or by way of innuendo, were defamatory of the plaintiff. They carried the innuendo that the plaintiff was an unscrupulous and unprincipled businessman and were calculated to disparage and discredit the plaintiff personally and in his trade. The articles had lowered the plaintiff in the estimation of right thinking members of society generally and brought him into contempt, hatred and public ridicule.

(4) The second and fifth defendants should have taken steps to ensure that what had been published was what they had written. Although they had read the articles soon after they were published, they did not take any steps to either correct the articles or tender an unqualified public apology to the plaintiff.

(5) The apology published in the magazine was not a full and frank withdrawal of the libel and was not a complete and unqualified apology or a fair retraction. The apology in open court came too late and the fifth defendant was still liable for libel although it would mitigate the damages to be awarded against him.

(6) Even if the third defendant had filed his defence of justification and fair comment, he bore the onus of proving what was written by him was true and a fair comment. In view of the third defendant's failure to substantiate his defamatory allegations, the allegations remained unproved and untrue and his defence of justification failed. Similarly, since the basic facts upon which his comments were based were not true, his defence of fair comment would also not succeed.

(7) Since the seventh defendant's managing director did not give evidence on the defences of justification, fair comment and privileged publication, it was held to have abandoned them.

(8) The defence of innocent publication is provided in s 7 of the Defamation Act 1957 ('the Act'). The seventh defendant's defence of innocent publication must fail because two conditions had not been met, ie first, it could not be said that the seventh defendant had published the articles innocently when the articles plainly referred to the plaintiff and secondly, the seventh defendant had not made an offer of amends as required under s 7(2) of the Act .

(9) There appeared to be a concerted agreement between and among the defendants to injure the plaintiff's personal and commercial reputation by the publication of the articles and they were jointly and severally liable for the libel.

(10) For the purpose of assessing the amount of damages, the tort of conspiracy merged with the tort of defamation.

(11) In this case, the defendants calculated that the prospects of material advantage from publishing the articles outweighed the prospects of material loss. The award of damages must be sufficient to convince any person of the baselessness of the libel and act as a signal to the public of the full vindication of the plaintiff's reputation.

(12) Aggravated damages were awarded against the third defendant because he had relied on justification and fair comment which he failed to establish and he had further repeated the libel in court.

(13) As against the seventh defendant, the court took into account the fact that it had pleaded justification and fair comment without any evidence whatsoever. Accordingly, where a plea of justification fails, damages which would be modest would become colossal.

(14) An injunction was also granted, inter alia, to restrain all the defendants from further publication of similar libel of the plaintiff.

[Bahasa Malaysia summary

Plaintif adalah, antara lain, pegawai eksekutif tertinggi kumpulan bagi Kumpulan Berjaya Bhd, sebuah syarikat awam yang disenaraikan. Plaintif telah menuntut gantirugi untuk tort libel dan komplot terhadap tujuh orang defendan berkenaan dengan empat buah rencana ('rencana-rencana itu') yang telah diterbitkan di dalam tiga naskah *Malaysian Industry* ('majalah itu'). Defendan pertama adalah ketua penyunting majalah itu dan defendan-defendan kedua hingga kelima telah menulis rencana-rencana itu. Defendan keenam pula adalah penerbit dan tuanpunya majalah itu sementara defendan ketujuh adalah pencetak tiga daripada rencana-rencana itu. Plaintif mendakwa bahawa rencana-rencana itu telah memfitnahnya dan setiap defendan, sama ada antara mereka sendiri dan/atau bersama orang lain, telah berkomplot melalui penerbitan sistematik rencara-rencana fitnah untuk merosakkan reputasi dan kerjaya perniagaannya. Plaintif juga memohon satu injunksi untuk menghalang defendan-defendan daripada terus menerbitkan libel yang didakwa itu.

Defendan pertama hingga keenam tidak memfailkan pembelaan mereka dan, lebih-lebih lagi, defendan keempat tidak hadir di mahkamah. Defendan kedua hingga kelima memberi keterangan bahawa apa yang dicetak itu bukanlah apa yang telah ditulis oleh mereka. Defendan kelima memberitahu mahkamah bahawa beliau telah menyuruh defendan pertama meminta maaf secara tidak bersyarat kepada plaintif, yang telah diterbitkan di dalam majalah itu. Defendan kelima juga telah meminta maaf kepada plaintif di mahkamah terbuka. Defendan ketiga menegaskan bahawa apa yang telah ditulisnya adalah benar dan beliau juga bergantung kepada pembelaan komen berpatutan. Beliau, walau bagaimanapun, enggan membuktikan dakwaan di dalam rencananya. Defendan pertama memberi keterangan bagi pihaknya sendiri dan defendan keenam dan mengaku bahawa rencana-rencana itu telah memfitnah plaintif tetapi menyatakan bahawa beliau telah meninggalkan tanggungjawab menyunting rencana-rencana itu kepada penyunting majalah itu. Defendan pertama mengatakan bahawa sebaik sahaja beliau mendapat tahu bahawa rencana-rencana itu bersifat libel, beliau telah meminta maaf kepada plaintif di dalam majalah itu. Pernyataan pembelaan defendan ketujuh membuat pli penerbitan ikhlas ('innocent publication'), justifikasi, komen berpatutan dan penerbitan terlindung ('privileged publication'). Namun demikian, pengarah urusan

defendan ketujuh cuma memberi keterangan mengenai pli penerbitan ikhlas.

Diputuskan, memberikan gantirugi sebanyak RM10 juta kepada plaintif:

(1) Memandangkan bahawa pembelaan tidak difailkan oleh defendan pertama hingga keenam, mereka dianggap sebagai telah mengaku penegasan yang dijadikan pli oleh plaintif. Defendan pertama, kedua, ketiga, kelima dan keenam telah dibenarkan memberi keterangan di mahkamah cuma untuk tujuan meringankan jumlah ganti rugi terhadap mereka dan bukan untuk mendirikan pembelaan mereka. Oleh itu, keterangan defendan ketiga atas pembelaan justifikasi dan komen berpatutan sia-sia sahaja.

(2) Adalah menjadi soalan undang-undang untuk keputusan mahkamah sama ada makna semula jadi dan biasa perkataan yang digunakan di dalam rencana-rencana itu boleh menyampaikan makna yang memfitnah tentang plaintif. Libel tidak bergantung kepada tujuan orang yang memfitnah tetapi kepada hakikat pemfitnahan dan oleh itu adalah tidak relevan untuk mempertimbangkan makna yang hendak disampaikan oleh penulis dan penerbit. Soalan itu mesti diputuskan dengan menggunakan satu ujian objektif.

(3) Rencana-rencana itu dalam makna semula jadi dan biasa mereka dan/atau melalui sindiran, telah memfitnah plaintif. Mereka membawa sindiran bahawa plaintif adalah seorang ahli perniagaan yang tidak berprinsip dan terhitung untuk merendah-rendah dan mencemarkan plaintif secara peribadi dan di dalam perniagaannya. Rencana-rencana itu telah merendahkan plaintif dalam pandangan ahli-ahli masyarakat yang berfikiran waras secara am dan membuatnya menghadapi penghinaan, kebencian dan cemuhan awam.

(4) Defendan kedua dan kelima seharusnya mengambil langkah untuk memastikan bahawa apa yang diterbitkan itu adalah apa yang telah ditulis oleh mereka. Walaupun mereka telah membaca rencana-rencana itu sejurus sahaja selepas mereka diterbitkan, mereka tidak mengambil langkah sama ada untuk membetulkan rencana-rencana itu atau meminta maaf di khalayak awam secara tidak bersyarat kepada plaintif.

(5) Nota meminta maaf yang telah diterbitkan di dalam majalah itu bukanlah satu penarikan balik libel itu secara penuh dan terus-terang. Ianya bukanlah nota meminta maaf yang penuh dan tidak bersyarat atau satu penarikan balik yang berpatutan. Permintaan maaf di mahkamah terbuka telah dilakukan terlalu lewat dan defendan kelima masih bertanggungan untuk libel itu walaupun ianya akan meringankan ganti rugi yang bakal diawardkan terhadapnya.

(6) Biarpun jika defendan ketiga telah memfailkan pembelaan justifikasi dan komen berpatutan, beliau masih memikul beban membuktikan bahawa apa yang telah ditulis olehnya adalah benar dan merupakan komen berpatutan. Memandangkan kegagalan defendan ketiga menyokong dakwaannya yang memfitnah, dakwaan itu terus tidak dibuktikan dan tidak benar dan pembelaan justifikasinya gagal. Secara sama, oleh kerana fakta asas yang menjadi dasar komennya adalah tidak benar, pembelaan komen berpatutan yang dikemukakan olehnya juga tidak berjaya.

(7) Oleh kerana pengarah urusan defendan ketujuh tidak memberi keterangan tentang pembelaan justifikasi, komen berpatutan dan penerbitan terlindung, defendan ketujuh dianggap sebagai telah melepaskan pembelaan-pembelaan itu.

(8) Pembelaan penerbitan ikhlas diperuntukkan di dalam s 7 Akta Fitnah 1957 ('Akta itu'). Pembelaan penerbitan ikhlas yang dikemukakan oleh defendan ketujuh semestinya gagal kerana dua syarat tidak dipenuhi, iaitu pertamanya, tidaklah boleh dikatakan bahawa defendan ketujuh telah menerbitkan rencana-rencana itu secara ikhlas apabila rencana-rencana itu dengan jelas merujuk kepada plaintif dan keduanya, defendan ketujuh tidak membuat tawaran untuk menebus tindakannya ('offer of amends') di bawah s 7(2) Akta itu.

(9) Nampaknya terdapat persetujuan yang dirancang di antara defendan-defendan untuk merosakkan reputasi peribadi dan perniagaan plaintif melalui penerbitan rencana-rencana itu dan mereka bertanggungan untuk libel itu secara bersesama dan berasingan.

(10) Untuk tujuan mentaksirkan jumlah gantirugi, tort komplot bercantum dengan tort fitnah.

(11) Di dalam kes ini, defendan-defendan telah membuat kiraan bahawa prospek mendapat keuntungan kebendaan daripada menerbitkan rencana-rencana itu melebihi prospek kerugian kebendaan. Award ganti rugi mestilah mencukupi untuk meyakinkan mana-mana orang tentang bagaimana tidak berasasnya libel itu dan bertindak sebagai suatu isyarat kepada orang ramai tentang pembersihan penuh reputasi plaintif.

(12) Gantirugi tambahan ('aggravated damages') telah diawardkan terhadap defendan ketiga kerana beliau telah bergantung kepada justifikasi dan komen berpatutan yang gagal didirikan oleh beliau dan beliau juga telah mengulang libel itu di mahkamah.

(13) Berkenaan defendan ketujuh pula, mahkamah mengambil kira hakikat bahawa ianya telah membuat pli justifikasi dan komen berpatutan tanpa sebarang keterangan sama sekali. Dengan itu, apabila suatu pli justifikasi gagal, ganti rugi yang mungkin kecil jumlahnya akan menjadi besar.

(14) Suatu injunksi juga telah diberikan, antara lainnya, untuk menyekat kesemua defendan daripada selanjutnya menerbitkan libel yang sama tentang plaintif.]

[*Editorial Note*: The first and sixth defendants have appealed to the Court of Appeal vide Civil Appeal W–02–223–94; the third defendant has appealed to the Court of Appeal vide Civil Appeal No W–02–222–94; and the seventh defendant has appealed to the Court of Appeal vide Civil Appeal No W–02–221–94.]

Notes

For cases on damages for defamation, see 12 *Mallal's Digest* (4th Ed) paras 42–51; [1989] Mallal's Digest 646–647; [1990] Mallal's Digest 481, 491.

For cases on defamation, see 12 *Mallal's Digest* (4th Ed) paras 64–139; [1989] Mallal's Digest 1490–1493; [1990] Mallal's Digest 1172–1177; [1991] Mallal's Digest 1941–1947; [1993] Mallal's Digest 1272–1276.

For cases on the defence, see 2 *Mallal's Digest* (4th Ed) paras 1715–1722; [1991] Mallal's Digest 390; [1992] Mallal's Digest 321; [1993] Mallal's Digest 248.

Cases referred to

Adam v Ward [1917] AC 309 (folld)

Associated Leisure Ltd (Phonographic Equipment Co Ltd) & Ors v Associated Newspapers Ltd [1970] 2 QB 450; [1970] 2 All ER 754; [1970] 3 WLR 101 (folld)

Associated Newspapers v Dingle [1964] AC 371; [1962] 2 All ER 737; [1962] 3 WLR 229 (folld)

Carson v John Fairfax & Sons Ltd (1993) 113 ALR 577 (folld)

Cassell & Co v Broome [1972] AC 1027; [1972] 1 All ER 801; [1972] 2 WLR 645 (refd)

Cassidy v Daily Mirror Newspapers Ltd [1929] 2 KB 331 (folld)

Cooper v Warburton (1931) 44 BCR 328 (folld)

Digby v Financial News Ltd [1907] 1 KB 502 (folld)

Hoste v Victoria Times Publishing Co (1889) 1 BCR 365 (folld)

Jones v Skelton [1963] 3 All ER 952; (1963) 63 SR (NSW) 644 (folld)

Joshua Benjamin Jeyaretnam v Goh Chok Thong [1989] 3 MLJ 1 (folld)

Lee v Wilson and MacKinnon (1934) 51 CLR 276 (folld)

Lewis v Daily Telegraph [1964] AC 234; [1963] 2 All ER 151; [1963] 2 WLR 1063 (folld)

Ley v Hamilton (1935) 153 LT 384 (refd)

McCarey v Associated Newspapers Ltd [1965] 2 QB 86; [1964] 3 All ER 947; [1965] 2 WLR 45 (refd)

Neeld v Western Broadcasting Co (1976) 65 DLR (3d) 574 (folld)

Pervan v North Queensland Newspaper Co Ltd & Anor (1993) 117 ALR 569 (folld) A

Ward v Lewis [1955] 1 All ER 55; [1955] 1 WLR 9 (folld)

Legislation referred to

Defamation Act 1957 s 7 B

VK Lingam (*Adam Bachek* and *W Satchithanandhan* with him) (*VK Lingam & Co* and *Adam Bachek & Associates*) for the plaintiff.

Noor Zilan Mohamed Noor (*AJ Hamzah & Co*) for the first and sixth defendants.

Karpal Singh (*M Manoharan* with him) (*Karpal Singh & Co*) for the third defendant. C

Ram Dhari (*KC Yap Kamaluddin & Partners*) for the seventh defendant.

Cur Adv Vult

D

Mokhtar Sidin J: At the end of the trial on 15 October 1994, I had reserved judgment for a week. I had then delivered an oral judgment in open court on 22 October 1994 but could not make available a copy of the judgment because it was handwritten. Since then, the judgment has been typed and I now make it available to the parties.

E

The plaintiff in this case is one Tan Sri Dato Vincent Tan Chee Yioun, a businessman. He is and was at all material times the group chief executive officer of Berjaya Group Bhd which is a company listed on the Kuala Lumpur Stock Exchange. The plaintiff is also the group chief executive officer of Berjaya Industrial Bhd, Berjaya Textiles Bhd, Berjaya Leisure Bhd, Berjaya Sports Toto Bhd and Berjaya Singer Bhd. (These companies together with Berjaya Group Bhd, are hereinafter referred to as 'the Berjaya Group of Companies'). F

The plaintiff claims against all the seven defendants that they had, either individually or in combination among themselves and/or with persons unknown, conspired by way of a systematic publication of articles vilifying G the person and character of the plaintiff with the object of destroying the plaintiff's personal and commercial reputation and his business career and position as the group chief executive officer of the Berjaya Group of Companies. The action by the plaintiff against the defendants is for libel, damages for the tort of conspiracy, aggravated and/or exemplary damages, an injunction to restrain the defendants and each of them by themselves, H their servants or agents, or in combination or otherwise howsoever from further publication and perpetration of the said libel or any similar or like libel of or concerning the plaintiff.

The first defendant is and was at all material times the publisher and editor-in-chief of the monthly magazine called the *Malaysian Industry* I (hereinafter called 'the said magazine'). The second defendant was a contributor and/or a staff writer of the said magazine. The third, fourth and fifth defendants are and were at all material times contributors of the said magazine. The sixth defendant is and was at all material times the

publisher and/or proprietor of the said magazine. The seventh defendant was the printer of the said magazine.

The particulars of the libel was published in the August 1993, October 1993 and January 1994 issues of the said magazine. The particulars of the libel as pleaded in the statement of claim appeared under four separate articles in the three issues of the said magazine. The first is as pleaded in para 8 of the statement of claim which appeared in the August 1993 issue written by the second defendant under the heading 'Vincent Tan's Media Forays'. The offensive words are contained in the following sentences which are extracted from separate paragraphs of the article:

> The media's ability to mould public opinion whetted the appetite of corporate predators. The most visible is Tan Sri Vincent Tan ...
>
> All the excitement was related to *The Sun*, a daily tabloid size newspaper which made its debut in June. What made the event particularly intriguing was that the man behind *The Sun* was none other than Vincent Tan ....
>
> ... Tan's decision was also governed by his relatively poor public image which stemmed from his various business manoeuvres ...
>
> ... suddenly conscious of the enormous power wielded by the local press and the apparent immunity enjoyed by business houses involved in the media industry, Vincent began an earnest search for a newspaper ...
>
> Vincent's media dealings first became public knowledge when he acquired a 20% stake in the highly successful *Star* newspaper. This advanced the idea that Tan was keen on getting a foothold in the local media, in line with his vague proposal to 'focus on other activities' ...
>
> While his stake did not give him total control, it was quite substantial and sufficient to influence the business pages at a time when he was expanding his business empire. Subsequently, Tan moved into the monthly magazine *Corporate World* ...
>
> But internal squabbles saw Yong breaking off his ties with the Berjaya Group just like his equally dynamic predecessor Patrick Low ...
>
> All available evidence up to the end of 1992 suggest Vincent Tan's active involvement in newspaper publishing and media-related business ...
>
> But then there is also the feeling that it is 'absurd for an industrialist to start a newspaper simply to push his own or those of his company' ...

The second article appeared in the October 1993 issue of the said magazine written by the third defendant under the heading 'Press manoeuvres'. The offensive words, which the plaintiff claims to be libellous, are pleaded under para 2 of the statement of claim and are as follows:

> Other corporate figures acquire media organizations to further their own interests. Launched with great fanfare, *The Sun* faded swiftly, becoming a vehicle for furthering the interests of its principal backer, Tan Sri Vincent Tan of the Berjaya Group. The paper began with great promise, printing political gossip and news that the other newspapers ignored. But the notion that it would be an alternative voice was quickly disabused ...
>
> P Tamilmani, the fiery editor of a Tamil weekly, *Thoothan*, went on a hunger strike in July to protest the Anti Corruption Agency's ('ACA') results in the investigation of Dato' Seri S Samy Vellu. *The Sun* stood alone in reporting this incident. Following that, Tan Sri Vincent called another

meeting of his editorial staff and complained that the paper was preventing him from getting government contracts since approval for some of his projects had to come from Samy Vellu. Vincent warned that Vellu was not to be criticized any more. As a result, *The Sun* was reduced to being an in-house paper for the Berjaya Group. Vincent's insistence that the paper 'not criticize his friends or praise his enemies' saw four senior members of the editorial staff resigning in protest ...

Together with this article a coloured photograph of the plaintiff appeared with the caption 'Vincent Tan Warned Journalists' under it.

The third article appeared in the January 1994 issue of the said magazine written by the fourth defendant under the heading 'Berjaya Industrial/Textiles Shares Sale Unanswered Questions?'. The particulars of the offensive words, which the plaintiff claimed to be libellous, appeared in para 14 of the statement of claim and are as follows:

The KLSE, in an effort to control excessive speculation, quickly declared the counter as 'designated securities'. It took the heat out of trading but what investors missed, say stock analysts, was the 'private placement of a large chunk of Berjaya Textiles shares just prior to its suspension and the price it was sold for ...

But what came as a bigger surprise to share analysts was the sale of an additional 15.8m BT shares on 22 November, a day before the request for suspension was made. The sale of 30m BT shares at prices between RM3.80 and RM4.98 subsequently lowered BIB's stake in BT to only 27.3m shares representing 38% equity compared to its 72% earlier ...

These shares manoeuvres have predictably drawn the ire of a section of research analysts in several stockbroking firms. The big question: why the sale and to whom did the 30m Berjaya Textiles shares go to? Says an analyst, 'The 30m shares could have gone to anybody within the company using a nominee. Such share transactions could not have taken place without the approval of Vincent Tan. Why sell at such a low price of RM3.80 just days before a bullish corporate announcement? It's simply very unethical ...'.

Instead, say analysts, at RM10 a share, BT shareholders stand to lose almost RM300m because of the private placement of the 30m shares. 'When shareholders act dumb they are treated like it,' added a visibly annoyed research chief referring to the development in the two companies ... .

Together with this article, a coloured photograph of the plaintiff appeared with the caption 'Vincent Tan: Unethical?'.

The fourth and last article also appeared in the January 1994 issue of the said magazine under the heading 'Financial Analysis/Berjaya Textiles Probing' written by the fifth defendant. The particulars of the offensive words which the plaintiff claimed to be libellous are pleaded under para 17 of the statement of claim and are as follows:

Jaya Tiasa has an initial five year log supply contract with Rimbunan Hijau Sdn Bhd, the flagship company of Sarawak timber baron Datuk Tiong Hiew King, who was widely acclaimed as Asia's biggest timber tycoon owning an estimated 800,000 hectares of timber concessions ...

A The interesting question to ponder is: what is the rationale of giving away Berjaya Textiles to Jaya Tiasa? Could there be some under the counter deals between the Tiong family and Tan Sri Dato Vincent Tan? The Tiong family is seen to be the party who will benefit substantially from the deal. This will in effect be a back door listing for the timber concern ...

B The whole deal sounds like a 'win-win' arrangement between Datuk Tiong's family and Tan Sri Vincent Tan. But what about the small shareholders of Berjaya Textiles?

Together with this article, a coloured photograph of the annual report of Berjaya Textiles Bhd appeared with the caption, 'A win-win situation for Vincent Tan'.

C From the record, it appears that only the seventh defendant filed its defence. I will deal with this later. The first to sixth defendants did not file their defence though the writ and the statement of claim were served on them sometime in February and March 1994. There is no application by any of them to extend the time to file their defence. Though the first, D second, third, fifth and sixth defendants appeared at the hearing, there was no application by any of them to ask for time to file the defence. The only application made by the second, third and fifth defendants was to get an adjournment in order for them to engage a counsel to appear on their behalf in court as their previous solicitors, AJ Hamzah & Co, wanted to discharge themselves. As such, for all intents and purposes, there is no E defence filed by these defendants. Since no defence had been filed, the defendants are deemed to admit the averments pleaded by the plaintiff. Though the first, second, third, fifth and sixth defendants gave evidence in court, I have allowed them to do so only for the purposes of mitigating the damages against them and not as evidence as to their defences. It must be F noted that the sixth defendant (who is in actual fact the first defendant) appeared through a counsel, and the second, third and fifth defendants are writers and educated persons, I see no reason or any excuse for them not to file their defence when it is clear in the writ that to answer the claim they must file their defence within a certain period. This has not been done. The fourth defendant did not file his statement of defence nor did he G appear in court.

The plaintiff gave evidence at great length to establish to the court why those articles are offensive, derogatory, destructive and defamatory of and concerning him. He was cross-examined by the defendants who appeared at the trial. It was pleaded by the plaintiff that each of the four H articles in their natural and ordinary meaning or, alternatively, by way of innuendo, had gravely defamed him and brought him into public ridicule, odium and contempt and as such he has suffered irreparable damage and injury to his personal integrity, commercial reputation and credit. It was also pleaded by the plaintiff that he has been grossly damaged in his office, profession, calling, trade or business held or carried on by him as chairman I and group chief executive officer of the Berjaya Group of Companies.

The defendants, when they gave evidence in court, admitted writing, publishing and printing those articles. Though the plaintiff had contended that the statements in those articles are defamatory and no defence had

been filed except by the seventh defendant, the court has a duty to consider and determine whether those statements are defamatory of the plaintiff. In determining this the court has to consider the natural and ordinary meaning of the words used in the articles and determine whether they are capable of conveying a defamatory meaning of and concerning the plaintiff. This is a question of law for the court to decide as clearly held by the Privy Council in the case of *Jones v Skelton* [1963] 3 All ER 952 at p 958; (1963) 63 SR(NSW) 644 at p 650:

> It is well settled that the question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the court ... [In *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at p 745, Lord Selbourne said:]
>
> > 'The test according to the authorities is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libellous sense.'
>
> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

What are defamatory words? Odgers in his book, *A Digest of the Law of Libel and Slander* (3rd Ed, 1896) Stevens & Sons Ltd, at p 1 has stated:

> No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a jus in rem, a right absolute and good against all the world. Words which produce, in any given case, appreciable injury to the reputation of another are called defamatory. Defamatory words, if false, are actionable. False defamatory words, if written and published, constitute a libel; if spoken, a slander. Words which on the face of them must injure the reputation of the person to whom they refer, are clearly defamatory, and, if false, are actionable, without proof that any particular damage has followed from their use.

Though this is a very old book but what is meant by defamatory is still applicable today and that is the principle and is the basis for me to decide in the present case. Thus, in the case of *Lewis v Daily Telegraph Ltd* [1964] AC 234 at p 258; [1963] 2 All ER 151 at p 154; [1963] 2 WLR 1063 at p 1068, the House of Lords held:

> There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not

A inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. ...

What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are B two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.

C Further down ([1964] AC 234 at p 277; [1963] 2 All ER 151 at p 169; [1963] 2 WLR 1063 at p 1088), the House of Lords held:

My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same D for the lawyer as for the layman is, as a matter of pure construction, undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and, unfortunately, as the law of defamation has to take E into account, is especially prone to so when it is derogatory.

What is the meaning of legal innuendos? This is explained in *Gatley on Libel and Slander* (8th Ed) at para 94 which states as follows:

Legal innuendoes. However, words may convey a defamatory imputation F only by reason of some special knowledge available to those to whom they are published, of the circumstances of publication, or of some special meaning or inference to be attached to or drawn from the words. The words are then said to carry an innuendo. In such a case the question is what meaning would be attached to the words by a reasonable man having special knowledge of any relevant facts or meanings.

G In the case of *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331 at p 354, Russell LJ held that of libel does not depend on intention of the defamer but on the fact of defamation. On the issue meaning conveyed by the publication in question, it is irrelevant to consider the meaning the writer and publisher intended to convey. In fact, the question of meaning H is to be determined by an objective test. In *Lee v Wilson & MacKinnon* (1934) 51 CLR 276 at p 288, Dixon J held that:

The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability depends upon mere communication of the I defamatory matter to a third person. The communication may be quite unintentional, and the publisher may be unaware of the defamatory matter.

The same principle is stated in the case of *Cooper v Warburton* (1931) 44 BCR 328, SC at p 329 where Morrison CJ said:

> It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words he used were calculated to convey a disparaging imputation.

In the case of *Adam v Ward* [1917] AC 309 at p 318, it was held that malice can be implied from mere publication of the defamatory matter, unless the publication was on what is called a privileged occasion.

Bearing the above principles in mind, let me now examine the articles individually.

The first article

I have taken great pains to read and peruse the article written by the second defendant which appeared in the August 1993 issue of the said magazine with particular reference to the passages alleged to be libellous in the context of the article read as a whole. The article states that the plaintiff's involvement in *The Sun* newspaper was aimed to change his poor public image arising from his various business manoeuvrings. The article also conveys the message to mean that the plaintiff had acquired a 20% equity in *The Star* newspaper in order to exercise improper and undue influence on the business pages of *The Star* at a time when he was expanding his business empire. It appears to me that the article in its natural and ordinary meaning conveys to the reader that the reason for the plaintiff to acquire the equity in the media business was in order to enjoy immunity from the law. In my view, the article also conveys the meaning that the plaintiff was motivated by selfish interests and also carried the innuendo that the plaintiff had abused his position as the group chief executive officer of the Berjaya Group of Companies in that the investment in *The Sun* and *The Star* newspapers was motivated solely for personal gain with the objective of improving his unclean public image. The article appears to indicate that there are internal squabbles in the Berjaya Group of Companies between the plaintiff and the group executive director, Yong Teck Ming, which the article claimed that the latter had broken his ties with the Group. This was denied by the plaintiff and there is no evidence to show otherwise. Upon reading those passages, I could not help but come to the conclusion that the article, particularly those passages which I have stated above, are defamatory of the plaintiff and/or carry the innuendos pleaded in the statement of claim.

The second defendant, when he gave evidence (which I have stated was solely for the purpose of mitigation because no defence had been filed), indirectly admitted that the words do convey such defamatory meaning. His excuse was what was printed was not what he had written, which appears to be the only mitigating factor. Since the article is stated to be written by him, he should have taken steps to ensure that what had been published was what he had written and not left it entirely to the editor. Further, he admitted that he had read the article immediately after it was published and he did not do anything about it. If he discovered that the words in the article were not wholly written by him, which I do not accept

as reliable and true, he should have taken all reasonable steps to correct and remedy the situation such as tendering his apology publicly.

The second article

On reading the second article which was written by the third defendant, I could not help but come to the conclusion that there is a close relationship and a common sting between this article and the first article when this article questioned the wisdom of the plaintiff in acquiring the equity in *The Sun* newspapers. Though the two articles were written by two different writers, they convey the meaning that the plaintiff is manoeuvring the mass media to enhance his personal reputation and further his personal business interests.

I have read the second article under the heading 'Press Manoeuvres' in the said magazine. This article is superimposed with a coloured photograph of the plaintiff with the caption 'Vincent Tan Warned Journalists'. The defamatory words are contained in two passages of the article. Reading this article as a whole, I find that it ridicules the plaintiff as a corporate figure who was involved in *The Sun* newspaper with the ulterior motive of furthering his own personal business interests and further carried the innuendo that he was unscrupulous in manoeuvring the editorial staff of the said newspaper by making them subordinate to his personal business interests. Further, the article alleged that the plaintiff had reduced the said newspaper to be an in-house paper for the Berjaya Group. It is also alleged by the said article that the plaintiff had insisted that the said newspaper should not criticize his friends nor praise his enemies, which in my opinion carried the innuendo that the plaintiff was exploiting the said newspaper as a tool for his own commercial interests. It is also stated that due to the criticism of Dato' Seri Samy Vellu, the Minister for Energy, Telecoms and Posts by the said magazine, the plaintiff and his group of companies lost several contracts. The article went further in stating that the plaintiff had directed the staff of the said magazine not to criticize the said Dato' Seri Samy Vellu.

The third defendant, when he gave evidence in court, was adamant that the defamatory passages in the article, written and published by him in the said magazine, were true. He relied on the plea of justification and fair comment. Since he has not filed his defence, the defence of justification and fair comment comes to nought. Even if he had filed his defence, the onus of proving that what was written inside was true and a fair comment is upon him. This is clearly stated in the case of *Digby v Financial News Ltd* [1907] 1 KB 502 where it was held (at p 509) that the onus is on the defendant to prove that the charges made are true in substance and in fact and in order to succeed in a defence of justification, he must prove the truth of the words complained of not only in their literal meaning but in their inferential or innuendo meanings as the jury may find the words to bear. Lord Denning MR, in the case of *Associated Leisure Ltd (Phonographic Equipment Co Ltd) & Ors v Associated Newspapers Ltd* [1970] 2 QB 450 at p 456; [1970] 2 All ER 754 at p 757; [1970] 3 WLR 101 at p 105, said:

I am sure Devlin J did not wish in any way to detract from the rule, well settled, which I will read from *Gatley On Libel and Slander* (6th Ed) p 462, para 1046:

> 'A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages.'

I have always understood such to be the duty of counsel. Like a charge of fraud, he must not put a plea of justification on the record unless he has clear and sufficient evidence to support it.

In the same case, Lord Denning said ([1970] 2 QB 450 at p 455; [1970] 2 All ER 754 at p 757; [1970] 3 WLR 101 at p 104):

> The defendants, in putting this plea of justification on the record, run a very grave risk. If it fails, the damages, which might otherwise have been modest, would now be colossal.

The third defendant in his evidence stated that what was written was true. He went further by saying that this was from reliable sources but he refused to reveal the sources and refused to prove the allegations stated in the article. He insisted that he stands by whatever he wrote and went on to say that if this means that he will be liable, so be it. In my view, even if he had filed his defence, the defence of justification would surely fail. In view of his failure to substantiate the defamatory allegations, the allegations remain unproved and untrue. Similarly, since the basic facts upon which the comments are based are not true, the defence of fair comment will not succeed as clearly stated in the case of *Pervan v North Queensland Newspaper Co Ltd & Anor* (1993) 117 ALR 569 at p 575 where the High Court of Australia held:

> The plaintiff says it cannot be fair comment because it is founded on untrue statements. No doubt when there is one published document in which the writer partly alleges and partly comments, and of which the sum total is defamatory, the document cannot be justified unless the facts are true and the comment fair; because if the facts do not warrant defamatory comment, the comment is not fair, and if the facts as alleged warrant defamatory comment, they are defamatory and must be proved to be true.

Further, in the case of *Joshua Benjamin Jeyaretnam v Goh Chok Thong* [1989] 3 MLJ 1, the Privy Council held [at p 3]:

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. *If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.* (Emphasis added.)

It is clear to me from the evidence that the third defendant has not got his basic facts right and since he is unable to prove them to be true, the defence of fair comment cannot succeed.

A In view of the above, I am of the view that the words complained of and written by the third defendant are defamatory of the plaintiff and/or carry the innuendo as pleaded in the statement of claim.

The third article

B The third article is entitled 'Berjaya Industrial/Textiles Shares Sale, Unanswered Questions?' which appeared in the January 1994 issue of the said magazine. It was written by the fourth defendant. The article appeared in the said magazine together with a coloured photograph of the plaintiff with the caption 'Vincent Tan: Unethical?'. The passages in this article C which were referred to by the plaintiff as being defamatory by the plaintiff portrayed the plaintiff as a man with a sordid reputation who juggled the sale of 30m Berjaya Textiles shares using a nominee within Berjaya Textiles Bhd and in doing so the plaintiff was guilty of duplicity and had abused his position as the group chief executive officer of the Berjaya Group of Companies. The words complained of also carried the innuendo that the D plaintiff was an unprincipled and dishonourable businessman who was in breach of his fiduciary duties to the shareholders of Berjaya Textiles Bhd and was an unscrupulous person who acted in collusion with a nominee in the company. Further, the unscrupulous and dishonourable conduct of the plaintiff had caused the shareholders of Berjaya Textiles Bhd to lose E RM300m. The plaintiff had denied this and had given evidence that the shareholders had gained because of this takeover and there is no evidence to the contrary.

The writer of this article, the fourth defendant, did not file his defence nor did he appear in court to answer the writ. I have the opportunity of reading the article and I find that the article and the passages referred F to in their ordinary and natural meaning and/or by way of innuendo are defamatory of the plaintiff.

The fourth article

G The fourth article also appeared in the January 1994 issue of the said magazine. This article, written by the fifth defendant, entitled 'Financial Analysis/Berjaya Textiles Probing' is somewhat related to the third article. Together with this article, a coloured picture of the cover of the Berjaya Textiles Bhd annual report appeared with the caption 'A Win-Win Situation for Vincent Tan'.

H The passages in this article are heavily punctuated with question marks. For example, it states:

> ... the interesting question to ponder is what is the rationale of giving away Berjaya Textiles to Jaya Tiasa? Could there be some under the counter deals between the Tiong family and Tan Sri Dato' Vincent Tan? ... the whole I deal sounds like a 'win-win' arrangement between Datuk Tiong's family and Tan Sri Vincent Tan. But what about the small shareholders of Berjaya Textiles?

Such question marks in the sentences highlighted above will give the reasonable reader an impression that there has been some impropriety and adopt a suspicious approach to the matter. This was emphasized by the High Court of Australia in the case of *Pervan v North Queensland Newspaper Co Ltd & Anor* (1993) 117 ALR 569. At p 598, the court held:

> In *Jones v Skelton* [1963] 3 All ER 952; (1963) SR (NSW) 644, the Privy Council said of a statement concerning a councillor which was followed by a question mark:
>
> > 'The question mark might convey to the reasonable reader the thought and the meaning that there had been some impropriety. The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place — an explanation which the writer of the letter did not care or did not dare to express in direct terms.'
>
> Similarly in the present case, I think that an ordinary reader would think that the question marks at the end of the first and second sentences in the advertisement indicated that there was something suspicious about the conduct of the councillors which needed investigation.

I have carefully considered the article and the relevant passages pointed out by the plaintiff. It is clear to me that the article and the passages are defamatory of the plaintiff. It appears to me on reading this article and the passages that the natural meaning is that the plaintiff had connived and conspired with one Dato' Tiong Hiew King in the sale of Berjaya Textiles to Jaya Tiasa Plywood and that Dato' Tiong Hiew King's family and the plaintiff would benefit from the deal at the expense and to the detriment of the Berjaya Textiles shareholders.

I also find that the words complained of carry the innuendo that the plaintiff is an unscrupulous and dishonourable businessman who engages in dubious, underhand and illegal deals to benefit himself and, therefore, he is unfit and unworthy to hold the position of group chief executive officer of Berjaya Textiles Bhd and the Berjaya Group of Companies.

The fifth defendant in his evidence agreed that upon reading the article and the relevant passages, they are defamatory of the plaintiff. Just like the second defendant, the fifth defendant claimed that the article appearing in the said magazine was not what he wrote. He claimed that the original article that he wrote was heavily edited and inserted by the editor. Though he read the article soon after it was published and realized that certain passages were defamatory of the plaintiff, he did not take any step to remedy the situation, such as correcting the article or retracting the article or tendering an unqualified apology to the plaintiff. He told the court that he did ask the editor and the first defendant to offer an unqualified apology on realizing that the article was defamatory of the plaintiff. Though the said magazine published an apology to the plaintiff, it appears to me upon reading the apology that the apology was a qualified apology. It appears to me that the fifth defendant regretted and he had offered his apologies in court. Since the apology came late, he is still liable under the

law. The three apologies may in a way help him to mitigate the damages to be awarded against him.

From the evidence, it is clear to me that each of the four articles and the relevant passages within are defamatory of the plaintiff. In my view the plaintiff has proved his case against the writers of the four articles.

Now let me turn to the other three defendants. The first defendant, as I have stated earlier, is the publisher as well as the editor-in-chief of the said magazine. The sixth defendant is the publisher of the said magazine and is, for all intents and purposes, the first defendant himself. The first defendant did not file his defence nor did he file one on behalf of the sixth defendant. Anyway, in his evidence on behalf of himself and on behalf of the sixth defendant, he admitted that all the articles were libellous of the plaintiff. He offered the excuse that he had left the responsibility to edit those articles to the editor before they were printed and published in the said magazine. He told the court that on discovering the four articles to be libellous he told the editor to make an apology. He also told the court that he had made an apology which appeared in the March 1994 issue of the said magazine under the column 'Letters to the Editor'. It appears to me that the apology was a conditional apology since it contained the words 'if the said articles had tarnished the reputation of the plaintiff'. The first defendant informed the court that he had dismissed the editor of the said magazine. The first defendant also stated that he met the plaintiff twice at the airport and apologized to him. What amounts to an effective apology? The requirements of an effective and adequate apology were aptly summarized by Begbe CJ in *Hoste v Victoria Times Publishing Co* (1889) 1 BCR 365 at 366 where he said:

> That [the apology] is surely not sufficient. It is not the offer nor even the publication of an apology at all, but an offer to offer an apology. And even in terms, it seems to reserve to the defendant a right of judging whether the plaintiff is reasonable in demanding any particular form, eg it offers to make an apology as the defendant thinks fit. Such an apology as merely 'beg your pardon', or 'sorry for it', is not sufficient in a case of libel. The defendant should admit that the charge was unfounded, that it was made without proper information, under an entire misapprehension of the real facts, etc, and that he regrets that it was published in his paper ... You should not offer to make, but actually make and publish at once, and unconditionally, such an apology, expressing sorrow, withdrawing the imputation, rehabilitating the plaintiff's character as well as you can; not stipulating that the plaintiff is to accept it; not making any terms but publishing it in the interest of truth, and because you are anxious to undo whatever harm which may have accrued from a wrong which you find you have been the unconscious instrument of inflicting. Then in your statement of defence you can state what you had done ... That is the only authority I know of making any reference to an apology in the pleadings. It will be for the jury to say whether it was a reasonable and proper apology, and whether it is sufficient to absolve the defendant from any or how much of the damage the plaintiff has suffered. Obviously some libels may inflict an injury and loss that no apology or retraction by, or even remorse of, the wretched, miserable, libeller can wholly efface.

Therefore, in my view, the apology by the first defendant and the sixth defendant was not a full and frank withdrawal of the libel contained in those articles and neither was it a complete and unqualified apology or a fair retraction.

Now let me turn to the seventh defendant. This is the only defendant who has filed his statement of defence. In his defence, he had pleaded innocent publication, justification, fair comment and privileged publication. The managing director of the seventh defendant, Mr Loh Wing Sang, testified in court. Though he had pleaded innocent publication, justification and other issues, Mr Loh Wing Sang testified only on innocent publication and stated that he regretted in printing those articles in the said magazine. In my view, in order to succeed in the defence of justification, fair comment and privilege, he should adduce evidence in respect of these. Since he did not give any evidence on these issues, I hold that he had abandoned them. The defence of innocent publication is provided for in s 7 of the Defamation Act 1957. Under this, the seventh defendant has to show that the words complained of were published by him 'innocently in relation to the plaintiff'. In my view it cannot be said that he had published them innocently when those articles plainly referred to the plaintiff whose coloured photographs were inserted in the articles. Secondly, the defendant must make an offer of amends under sub-s (2) which must be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved. These two conditions have not been met by the seventh defendant. As such, his defence of innocent publication should fail. Mr Loh Wing Sang admitted that on reading the articles, they were libellous and he expressed his regrets. Anyway, it is clear to me that the seventh defendant only printed three of the four articles. Since the seventh defendant had not been careful in its publication, I find that the plaintiff has proved his case against the seventh defendant.

Thus, I find that all the passages referred to in the four articles are defamatory of and concerning the plaintiff.

Conspiracy

The plaintiff also pleads that each of the defendants had either between themselves and/or in combination with others commenced a conspiracy by way of a systematic publication of articles vilifying the person and character of the plaintiff with the object of destroying the plaintiff's personal and commercial reputation and his business career and position as the group chief executive officer of the Berjaya Group of Companies. There is no difficulty for me to find that conspiracy exists in the first defendant and sixth defendant since they are the editor and publisher of those articles. I also find that there is no difficulty for me to find the conspiracy on the part of the seventh defendant since he is the printer of those articles.

As to the second, third, fourth and fifth defendants, they claimed that they did not know each other before they wrote those articles. As I have stated earlier, there appears to be a relativeness, a linkage and a

common sting between those articles. The articles by the second and third defendants are on the same issues and the articles written by the fourth and fifth defendants are also of the same issues though different from the articles written by the second and third defendants. It appears to me that there has been a concerted agreement between and among the defendants of a predominant intention to injure and damage the plaintiff's personal and commercial reputation and personal career by the publication of the four defamatory articles in question which in fact has caused irreparable injury, harm and damage to the plaintiff. This is the common link in all the four articles. However, applying the principle in the case of *Ward v Lewis* [1955] 1 All ER 55; [1955] 1 WLR 9, the tort of conspiracy merges with the tort of defamation.

Finding of the court

I find that the relevant passages of the four articles, each by themselves and cumulatively, are untrue and defamatory of the plaintiff and have lowered the plaintiff in the estimation of right thinking members of society generally and brought him into contempt, hatred and public ridicule. I further hold that the said defamatory words have produced an adverse impression of the plaintiff upon the minds of fair and reasonable persons and were calculated to disparage and discredit the plaintiff personally in his reputation and in his trade or business held and carried on by him.

The defendants who had participated or authorized the publication of the libel in the said magazine are all jointly and severally liable for the publication of the libel and, therefore, all the defendants are prima facie liable.

Damages

I will now determine the relief to be granted to the plaintiff. One of the reliefs prayed for by the plaintiff is damages for the tort of conspiracy and damages for libel. Applying the principle expounded in the case of *Ward v Lewis*, the tort of conspiracy merges with the tort of defamation. The first relief is for damages.

In awarding damages, the evidence of the plaintiff's good character is irrelevant as the law presumes that he is a person of good character. According to *Gatley on Libel and Slander* (8th Ed) at para 1333:

> Evidence of the plaintiff's good character is, as a rule, irrelevant or unnecessary in an action of defamation, for the law presumes that his character is good until the contrary is proved and he can safely rest on that presumption.

Gatley on Libel and Siander (8th Ed) at para 1451 sets out the matters which ought to be taken into account in assessing damages:

> The amount of damages is 'peculiarly the province of the jury', who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode

and extent of publication, the absence or refusal of any retraction or apology, and 'the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action', and also it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow 'for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused. They should also take into account the evidence led in aggravation or mitigation of the damages.'

In *Carson v John Fairfax & Sons Ltd* (1993) 113 ALR 577 at p 589, the High Court of Australia expounded the following principles of law:

> ... there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that 'the amount of a verdict is the product of a mixture of inextricable considerations'. The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: *the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation.* 'The gravity of the libel, the social standing of the parties and the availability of alternative remedies' are all relevant to assessing the quantum of damages necessary to vindicate the appellant. (Emphasis added.)

In *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86 at pp 104–105; [1964] 3 All ER 947 at p 957; [1965] 2 WLR 45 at p 60, Pearson LJ said:

> Compensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings — the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in case where the damages are at large.

Lord Hailsham LC in *Cassell & Co v Broome* [1972] AC 1027 at p 1071; [1972] 1 All ER 801 at p 824; [1972] 2 WLR 645 at p 669 stated as follows:

> ... in case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge ...
>
> Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence

A of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant.

Bouck J noted in *Neeld v Western Broadcasting Co* (1976) 65 DLR (3d) 574 at p 576 that:

B The measure of damages must bear some relation to the actual standing and reputation of the plaintiffs in the community prior to the libel. The higher the reputation the greater the damages.

In the present case, plaintiff is a prominent and successful businessman who is recognized not only in Malaysia but also internationally. The plaintiff had testified in court that he has been very gravely and seriously C injured in his reputation and personal standing in society. His fellow directors are now more cautious and less trusting of him. The shareholders and bankers have doubts about his professional integrity, especially of the allegations on his under counter dealings. The plaintiff in his sworn evidence said:

D I was very, very upset, hurt and those articles had caused me great anxiety and stress because the allegations were very grave and serious ...

All the four articles have injured me in the following ways. It has affected my standing in the business community both nationally and internationally. My credibility and integrity and standing as the leading E businessman has been severely tarnished and tainted. To my business partners and directors of all the companies I have associated, hence became more cautious and less trusting as a result of these articles. Fund managers who invest in the shares of all companies in the Berjaya Group had become very concerned and less trusting and some of them have sold their holdings in the Berjaya Group. To bankers, my standing has been affected. I found F more difficulty in getting loans and if I succeeded the interest rates were higher because my credit risk is perceived to be greater. To the shareholders of all the companies in Berjaya Group who read the articles were upset and some of them had sold their shares. To the general public my image and standing had been affected, tainted and subjected to ridicule ...

I am the businessman of national and international standing. I am well G known in Malaysia, Asia and North America. The damage done to me is very grave and serious. Therefore the quantum to be awarded must reflect the gravity of the libel and serve as a true vindication of my standing both in Malaysia and overseas ...

To me RM20m is not a big money. If I am weak I would collapse ...

H The seventh defendant had submitted evidence that 10,000 copies of the magazine were printed for distribution to the business community in Malaysia for each publication. This magazine is read by influential people in the business community including bankers, fund managers, company shareholders and others. Therefore, 'it is impossible to track the scandal, to know what quarters the poison may reach', as stated by [Lord Atkin in I *Ley v Hamilton* (1935) 153 LT 384 and quoted by] Lord Diplock in *Cassell & Co v Broome* [1972] AC 1027 at p 1125; [1972] 1 All ER 801 at p 870; [1972] 2 WLR 645 at p 719 and account must be taken of 'the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely

to undo the harm it [the libel] has done or the hurt it has caused ....' as Lord Radcliffe said in *Associated Newspapers v Dingle* [1964] AC 371 at p 399; [1962] 2 All ER 737 at p 747; [1962] 3 WLR 229 at p 242.

The contention by the plaintiff that the business of the Berjaya Group of Companies had suffered through loss of business opportunities as a result of this libel is irrelevant because the companies are not the parties to this suit. It is the plaintiff alone who is claiming for damages.

In my opinion, each case must be judged on its own particular facts and on its own merits. In the present case, a very serious libel has been perpetrated on the plaintiff. The defendants calculated that the prospect of material advantage from publishing the said articles outweighed the prospects of material loss.

Therefore, bearing in mind the principles applicable in the assessment of damages and in considering all the various factors, including the following:

(1) the position and standing of the plaintiff;

(2) the gravity and seriousness of the libel;

(3) the mode and extent of the publication;

(4) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(5) the uncertainty undergone in litigation;

(6) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and

(7) the absence or refusal of any correction, retraction or apology,

this court finds that the award must also be sufficient to convince any person of the baselessness of the libel and act as a necessary and sufficient signal to the public at large of the full vindication of the plaintiff's reputation both in Malaysia and internationally. Taking the above into consideration, I am of the view that the damages to be awarded against each defendant must be treated individually.

Taking all these factors into account I will order the following:

(1) Against the first defendant — general damages of RM3m.

(2) Against the second defendant — general damages of RM750,000.

(3) Against the third defendant — this court awards general and aggravated damages because the third defendant had relied on justification and fair comment which he failed to establish and he further repeated and aggravated the libel in court. The House of Lords in *Cassell & Co v Broome* [1972] AC 1027 at p 1073; [1972] 1 All ER 801 at pp 825–826; [1972] 2 WLR 645 at p 671 stated that:

> In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and as the result of the conduct exciting the indignation demands a more generous solatium.

Therefore, this court awards against the third defendant general and aggravated damages in the sum of RM2m.

(4) Against the fourth defendant — general damages of RM1m.

(5) Against the fifth defendant — this court has taken into account the fact that the fifth defendant had apologized three times in open court. Therefore, the court awards against the fifth defendant the sum of RM250,000 as general damages.

(6) Against the sixth defendant — general damages of RM2m.

(7) Against the seventh defendant — the court has taken into account the fact that the seventh defendant did not print the August 1993 issue of the said magazine. Taking into account the fact that the seventh defendant has pleaded justification and fair comment without any evidence whatsoever and applying the principle as stated by Lord Denning in the *Associated Newspapers* case that where a plea of justification fails, damages which would be modest will become colossal, this court awards against the seventh defendant the sum of RM1m as general damages.

(8) This court also grants an injunction to restrain all the defendants each of them by themselves, their servants or agents, or in combination or otherwise howsoever from further publication and perpetration of the said libel or any similar or like libel of or concerning the plaintiff.

(9) Interest on the above sums at the rate of 8%pa from the date of judgment to the date of full recovery.

(10) Costs to the plaintiff against all the defendants.

Order accordingly.

Reported by Wong Kian Kheong